

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 1, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP2992-CR

Cir. Ct. No. 2013CF431

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEVIN J. WARFIELD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: DONALD R. ZUIDMULDER, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Devin Warfield appeals a judgment convicting him of soliciting a child for prostitution, child enticement-prostitution, and prostitution as a party to a crime, all as repeaters. He also appeals an order denying his motion for postconviction relief. Warfield argues his trial counsel was ineffective for

failing to object to the admission into evidence of inaccurate copies of text messages. As a result, Warfield argues he is entitled to a new trial. We conclude Warfield fails to demonstrate prejudice and affirm the judgment and order.

BACKGROUND

¶2 Warfield was charged with sexual exploitation of a child, trafficking a child, soliciting a child for prostitution, child enticement-prostitution, bail jumping, and prostitution as a party to a crime, all as repeaters. At trial, the State claimed Warfield arranged a meeting between detective Scott Callaway, acting in an undercover capacity, and the victim, a sixteen-year-old girl, for the purpose of prostitution. The State called the victim and Callaway as witnesses.

¶3 Detective Callaway testified that he became aware of a prostitution advertisement posted on a website and initiated an undercover investigation. As part of the investigation, Callaway exchanged text messages with a person at phone number 920-809-XXXX,¹ the number listed in the advertisement, to arrange a meeting. Through the text messages, Callaway confirmed the time and location of the meeting. Callaway also obtained rates of \$120 for a half-hour and \$200 for an hour, and a physical description of the female he would be meeting: “I’m 24, W, 130 pounds [and] 36C, 5’4”, blonde, red, brown hair. Freaky.”

¶4 Callaway typed onto a piece of paper a copy of the text messages that he sent and received. The State introduced Callaway’s copy of the messages

¹ We redacted the full phone number in this decision. Any references to “920-809-XXXX” are to the identical phone number.

into evidence as Exhibits 10 and 17.² In Exhibit 10, Callaway identified the person he was exchanging text messages with as 920-809-XXXX. In Exhibit 17, rather than using the phone number 920-809-XXXX, Callaway identified the person he was exchanging text messages with as “Devin.” Exhibit 17 also contained two paragraphs of Callaway’s narrative report. Warfield’s trial attorney did not object to either of the exhibits being admitted into evidence.

¶5 The circuit court granted a directed verdict and dismissed the sexual exploitation charge on the defense’s motion at the close of the State’s case. Warfield chose not to testify and did not call any witnesses. The remaining counts, with the exception of the bail jumping count, were submitted to the jury. During deliberations, the jury requested Exhibits 10 and 17. The parties agreed the narrative portion of Callaway’s report should be redacted from Exhibit 17 so only the text messages would be visible. The court made the requested redaction and marked the revised version of Exhibit 17 as Exhibit 17A. Exhibits 10 and 17A were submitted to the jury without further objection.

¶6 The jury found Warfield guilty of soliciting a child for prostitution, child enticement-prostitution, and prostitution as a party to a crime, but it could not reach a unanimous verdict on the child trafficking count. The court granted the State’s motion to dismiss that count and to dismiss and read in the bail jumping charge at the sentencing hearing.

¶7 Warfield filed a postconviction motion alleging he received ineffective assistance of trial counsel. In particular, Warfield argued his attorney

² Exhibit 10 contained the first part of the messages that were exchanged, and Exhibit 17 contained the second part.

should have objected to the admission of Callaway's typed version of the messages into evidence, because the typed version was not an original or a duplicate as specified in WIS. STAT. §§ 910.02 and 910.03,³ and Exhibit 17A was inaccurate. Warfield asked the circuit court to conduct an evidentiary hearing and, after the hearing, to vacate the judgment of conviction and grant him a new trial. In the alternative, Warfield asked the court to modify his sentence.

¶8 During the evidentiary hearing, Warfield's trial counsel testified that he did not object to the typed version of the text messages being admitted into evidence because the original messages were on the detective's cell phone and someone needed to copy them down. He believed detective Callaway's transcribed version was accurate. Upon reviewing Exhibit 17A again, however, Warfield's trial counsel acknowledged, since Callaway did not know who was at the other end of the conversation at the time the text messages occurred, the name "Devin" would not have appeared in Callaway's phone. Warfield's trial counsel agreed Exhibit 17A was not an accurate copy and admitted he never saw the original messages to know if other parts of the transcribed messages were inaccurate. Warfield's trial counsel also testified that he could not recall any strategic reason for not objecting to the text-message exhibits.

¶9 The circuit court concluded that Warfield's trial counsel did not provide ineffective assistance. First, the court concluded Warfield's trial counsel was not ineffective in failing to object to the exhibits because, "in the dynamics of the trial, and the way this was coming in," it was unsure what the ruling would

³ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

have been if Warfield's counsel had objected. Additionally, the court explained, the objection would have simply alerted the State to lay a better foundation or call another witness. The court next concluded the exhibits did not prejudice Warfield. The court denied Warfield's motion for a new trial and his motion for resentencing. Warfield now appeals the circuit court's order denying his ineffective assistance of counsel claim.

DISCUSSION

¶10 “The right to counsel includes the right to effective assistance of counsel.” *State v. Thiel*, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305 (citing *Strickland v. Washington*, 466 U.S. 668, 686 (1984)). To prevail on an ineffective assistance of counsel claim, a convicted defendant must show counsel's performance was deficient and the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. Counsel's performance is deficient if it “fell below an objective standard of reasonableness.” *Id.* at 688. The test for prejudice, in turn, is whether “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

¶11 Ineffective assistance of counsel claims present a mixed question of law and fact. *Thiel*, 264 Wis. 2d 571, ¶21. We will uphold the circuit court's findings of fact unless those findings are clearly erroneous. *Id.* However, we review de novo whether the trial counsel's performance satisfies the constitutional standard for ineffective assistance of counsel. *Id.* Additionally, if the defendant makes an insufficient showing on one component of the ineffective assistance of

counsel claim, we are not required to address both components. *Strickland*, 466 U.S. at 697.

¶12 We need not decide whether Warfield’s trial counsel’s performance was deficient, because we conclude introduction of the exhibits did not result in prejudice to Warfield’s defense. The State was required to show Warfield arranged the meeting between detective Callaway and the victim to prove him guilty of child enticement-prostitution, soliciting a child for prostitution, and prostitution as a party to a crime. *See* WIS. STAT. §§ 939.05, 944.30, 948.07(2), 948.08. Warfield argues the improperly admitted text messages went directly to this factual determination and listing “Devin,” the defendant’s name, in Exhibit 17A took the determination out of the jury’s hands. However, even if Exhibits 10, 17, and 17A had not been admitted or provided to the jury, other, overwhelming evidence linked Warfield to the phone number and text messages at issue.

¶13 First, the State presented photographs of a series of Facebook messages between Warfield and the victim that were admitted into evidence. In the messages, the victim repeatedly asked Warfield for money. At one point, Warfield asked the victim, “Did u kno I sell pussy for a living?” A couple of weeks later, the victim contacted Warfield and stated, “I needa make some extera money lemme come work fo u.” Warfield responded, “[B]ang dat,” which the victim testified meant “are you serious,” “I don’t believe you,” or “prove it.” Warfield then asked, “[S]o if i come thru right now u goin b ready to get this money?” The victim responded, “Can u call me fo we can talk bout this?” Warfield then directed the victim to send him a text message at phone number 809-XXXX.

¶14 Next, detective Callaway testified regarding the content of the text messages in Exhibits 10 and 17. Through Callaway's testimony, the jury learned 809-XXXX was the phone number with which Callaway was exchanging text messages. *See supra* ¶3. The jury also learned the information that was relayed through the text messages with that number, including the date, time, and location of the meeting, a description of the female that would be meeting Callaway, and the rates. Thus, the jury was aware of the content of the messages and the phone number of the person communicating with Callaway even if the text messages were not admitted into evidence.

¶15 Additionally, the cell phone associated with number 809-XXXX was found under the bed in the hotel room where Warfield was arrested. Detective Callaway testified that Warfield originally claimed the phone belonged to the victim but later admitted to possessing the phone "almost all the time" and texting from it. Callaway also testified that Warfield admitted texting back and forth with Callaway from phone number 809-XXXX and, more specifically, that Warfield admitted texting Callaway the half-hour and hour rates. Callaway testified that the victim called him using that number shortly before the meeting took place, but he later explained that Warfield admitted handing the victim the 809-XXXX cell phone to make that call.

¶16 Finally, photographs of the victim's cell phone were admitted into evidence. The photographs contained images of the victim's phone's screen in which the name "Devin" appeared next to phone number 920-809-XXXX at the top of the screen and the messages exchanged between the victim and Warfield followed. The messages, in part, consist of Warfield, shortly before the meeting was scheduled to take place with detective Callaway, questioning the victim about her whereabouts and her estimated arrival time. At one point, the victim asked

Warfield, “Yu sure dude stright? Cuz a bitch hot.” The victim testified that “cuz a bitch hot” meant a warrant had been issued for her because she had missed a juvenile court appearance. In a later message to the victim, Warfield responded, “I’m not finna argue[]with u that shit dead. U want this money or,[]not.”

¶17 Based on this evidence, and even in the absence of Exhibits 10, 17, and 17A, it was clear to the jury that Warfield used the 809-XXXX cell phone to arrange the meeting between detective Callaway and the victim. We conclude there is not a reasonable probability that but for Warfield’s trial counsel’s failure to object to the admission into evidence of the typed version of the text messages, the jury would have reached a different verdict. *See Strickland*, 466 U.S. at 694. Accordingly, Warfield has not satisfied the prejudice component of his ineffective assistance of counsel claim.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

